(8)

No. 98-404

In The

Supreme Court of the United States

October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Appellants,

vs.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, AMERICAN CIVIL LIBERTIES UNION, AND PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF APPELLANTS

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INTERESTS OF AMICI CURIAE

With the consent of the parties, the Brennan Center for Justice at New York University School of Law, the American Civil Liberties Union, and the Puerto Rican Legal Defense and Education Fund submit this brief *amici curiae* in support of defendants-appellants.[1] Letters of consent are on file with this Court.

The Brennan Center for Justice is a partnership between the friends, family, and law clerks of Justice William Brennan, Jr. and the faculty of New York University School of Law. The Center strives to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice Brennan. At Justice Brennan's insistence, the Center pays no special deference to his views or opinions. In keeping with Justice Brennan's spirit, the Center has created a Democracy Program, which undertakes projects to promote equal representation and other core ideals of democratic government.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In particular, the ACLU has long been dedicated to defending the principle of one-person, one-vote, and to challenging government policies and practices that disadvantage traditionally underrepresented minorities.

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") is a national civil rights organization that exists to ensure that every Puerto Rican as well as other Latinos are guaranteed equal opportunities to succeed. Through litigation, advocacy, and education, PRLDEF has initiated hundreds of cases

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1. Pursuant to Supreme Court rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, contributed monetarily to the preparation or submission of this brief.

to combat discrimination in significant areas such as education, housing, employment, voting, and language rights.

Amici take interest in this case because they believe that a truly representative democracy cannot be sustained without an accurate count of the whole population, including racial and ethnic minorities at risk of marginalization. Undercounted groups face an unfair erosion of their members' ability to participate in the democratic process and a symbolic rejection of their status as full members of the polity. For these reasons, the Founders mandated a decennial census in Article 1, section 2, clause 3 of the Constitution. For the same reasons, the Thirteenth, Fourteenth, and Fifteenth Amendments (the "Reconstruction Amendments") altered the original Census Clause to require a full and inclusive count of the population, including racial and ethnic minorities.

In this case, all parties acknowledge that the decennial census regularly undercounts the population and that people of color are disproportionately undercounted. *Amici* believe that the ongoing practice of differentially undercounting racial minorities poses critical challenges to American democracy. Most directly, the differential undercount of minority populations may result in malapportionment of Congressional districts and consequent dilution of minority voting power on the national level. Because most states rely on census data for local districting purposes, the widespread disproportionate undercounting of people of color could have similar effects at all levels of state and local government.

Of at least equal importance, the ongoing differential undercount reduces the degree of confidence that members of minority communities have in American democracy by sending an unmistakable message that people of color are not full partners in the polity. In the 1996 Presidential elections, turnout among all voters was less than 50% of the eligible electorate; turnout among minority voters was much lower. These troubling statistics reflect a profound alienation of many citizens, especially citizens of color, from our democratic institutions. Choosing to continue a census

process that has — and will — differentially undercount citizens of color can only deepen and reinforce that disaffection.

Amici believe that the Secretary of Commerce's decision to use widely accepted statistical sampling techniques to avoid the differential undercount is a laudable attempt to achieve the constitutional goal of equal representation of racial and ethnic minorities and to reaffirm the equal status of members of those communities in American democracy. *Amici* submit this brief because a decision precluding the Secretary's efforts would undermine fundamental democratic values and unnecessarily exacerbate the alienation of minority populations from American political life.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a conflict between two diametrically opposed readings of both the Constitution and the Census Act. One would require a decennial census that continues an unfortunate history of excluding racial and ethnic minorities, especially African-Americans, from full participation in the nation's democratic life; the other would allow a decennial census that makes every effort to include members of racial and ethnic minorities as full participants in American democracy. The readings advanced by the Secretary of Commerce permit him to augment the traditional physical census count with commonly accepted and reliable statistical sampling techniques designed to avoid a differential undercount of the minority population. Conversely, the readings advanced by the House of Representatives preclude the Secretary from using such techniques, even if the resulting undercount will lead to underrepresentation of the minority population.

Wisconsin v. City of New York, 517 U.S. 1 (1996), announced the standard for challenges to the Secretary's conduct of the census. The Court explained that the Secretary's decision whether or not to adjust the census need bear only "a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." Thus,

> so long as the Secretary's conduct of the census is "consistent with the constitutional language and the constitutional goal of equal representation," it is within the limits of the Constitution.

Id. at 19-20 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992)). Here, the Secretary has decided that statistical adjustment of the 2000 census will increase numerical accuracy and remedy the disproportionate undercount of racial and ethnic minorities without introducing distributive or other inaccuracies into the tally. Accordingly, the Secretary, guided by the expertise of the National Academy of the Sciences and the professional staff of the Bureau of the Census, proposes to use statistical adjustment techniques in conducting the 2000 census. The Secretary's effort to conduct an inclusionary census is clearly consistent with the relevant constitutional and statutory texts.

Amici demonstrate in Point I below that the Constitution not only *permits* the Secretary's plan, but in fact *affirmatively encourages* efforts to include racial minorities fully in the count, and may even *require* the discretion to use techniques for avoiding a discriminatory undercount when the Secretary determines that such techniques are necessary and appropriate. Even the original Census Clause, which counted slaves as only three fifths of a person, sought to achieve an accurate count of the population and, thus, would permit the Secretary's good faith efforts to avoid preventable undercounting. *See* Point I(A).

The Reconstruction Amendments freed the original Census Clause from its racist heritage and heightened the importance of accuracy by emphasizing the inclusion of traditionally excluded African-Americans in the decennial tally. As seen through the prism of the Reconstruction Amendments, the Census Clause does not merely permit the Secretary to correct undercounts that perpetuate the unequal representation of minority populations, but in fact strongly encourages the Secretary to do so. *See* Point I(B).

Indeed, as Point I(C) shows, section 2 of the Fourteenth Amendment depends upon the avoidance of a differential

undercount of minorities to maintain the structural integrity of its incentive system for African-American enfranchisement. Section 2 therefore operates as an independent constraint on Congressional power that preserves the ability to use corrective sampling techniques, where, as here, the Secretary has determined that they are necessary to avoid a discriminatory undercount of the minority population.

The constitutional principles developed in Point I should govern this Court's interpretation of the Census Act. *See* Point II. This Court should resolve any ambiguities in favor of an interpretation that advances the manifest purpose of the Census Clause, as amended by the Reconstruction Amendments, which is to produce an accurate and fully inclusive count of the population, especially racial and ethnic minorities. In addition, the Census Act should be construed to avoid the serious constitutional question that would be presented under Section 2 of the Fourteenth Amendment if the Act were read to forbid the Secretary from using widely accepted statistical techniques to correct preventable undercounts of minority populations.

ARGUMENT

I.

THE CENSUS CLAUSE, AS AMENDED BY THE RECONSTRUCTION AMENDMENTS, CANNOT PLAUSIBLY BE READ TO FORBID CENSUS OFFICIALS FROM USING TECHNIQUES REQUIRED TO PREVENT A DISPROPORTIONATE UNDERCOUNT OF MINORITIES.

The Secretary's plan to use statistical sampling techniques to remedy the disproportionate undercount of minorities is fully consistent with "the constitutional goal of equal representation," *Wisconsin*, 517 U.S. at 19, embodied in the Census Clause. As originally written, the Census Clause constitutionalized the principle of equal representation for white persons, permitting all efforts by the federal government to achieve an accurate population

count. However, the Census Clause's equal representation principle was perverted by the "three fifths compromise," which simultaneously validated the institution of slavery and diluted the vote of white Northerners relative to white Southerners. The Reconstruction Amendments overturned the "three fifths compromise" and ended its distorting effects by extending the principle to all persons, including African-Americans. Thus, the Census Clause, as amended by the Reconstruction Amendments, embraces a principle of inclusionary accuracy that permits, and may indeed require, the Secretary's current effort to reduce the differential undercount.

A. The Census Clause, as Originally Written, Furthered the Principle of Equal Representation for White Citizens by Mandating an Accurate Assessment of the Population.

1. The Key Concern of the Census Clause Is Accuracy of the Count.

The text and structure of the Census Clause leave no room for doubt that the Framers intended it to ensure that apportionment of the House of Representatives always would be based on an accurate assessment of the population.[2] Accuracy was essential to ensure "that no matter where he lived, each voter should have a voice equal to every other in electing members of Congress." *Wesberry v. Sanders*, 376 U.S. 1, 10 (1964). To that end, the

2. One of the central questions the Framers faced was that of the composition of the national legislature. *See Wesberry v. Sanders*, 376 U.S. 1, 10 (1964) ("The question of how the legislature should be constituted precipitated the most bitter controversy of the Convention."). The larger states preferred representation on the basis of population. The smaller states preferred that each state receive an equal vote in the national legislature. *See id.* at 10-14; Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 1.1(g), at 27-29 (2d ed. 1992). The result of this disagreement was the "Great Compromise," which created the House of Representatives, where each state would be represented in proportion to its population, and the Senate, where each state would receive two seats. *See Wesberry*, 376 U.S. at 12-14.

original Census Clause provided that an "actual Enumeration" of the United States be made after the first meeting of the United States Congress, and every subsequent ten years, "in such Manner as [the Congress] shall by Law direct." U.S. Const. Art. I, § 2, cl. 3. In addition, the Clause provided that "Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers" as determined by the "actual Enumeration." *Id.*

The structure of the Clause manifests a concern for accuracy in three distinct ways. First, the Framers made Congress responsible for conducting the census, because the states did not trust each other to accurately report their population figures. Second, the Framers "included the periodic census requirement in order to ensure that entrenched interests in Congress did not stall or thwart needed reapportionment" and thereby undermine the principle of equal representation. *Franklin*, 505 U.S. at 791 (citing 1 Max Farrand, *The Records of the Federal Convention of 1787*, 571, 578-88 (rev. ed. 1966)).[3] Third, the Framers believed that tying taxation to population totals would discourage states from exaggerating their numbers.

The language of the Census Clause further indicates that the Framers were concerned with ensuring the accuracy of the census, rather than with mandating any particular methodology for conducting the count. The broad grant of discretion inherent in the command that the census be conducted "in such Manner" as

3. *See also Wesberry*, 376 U.S. at 13-14 ("The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people,' an idea endorsed by [George] Mason as assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives.") (quoting Farrand, *supra*, at 579, 580); *Young v. Klutznick*, 497 F. Supp. 1318, 1332 (E.D. Mich. 1980) ("The framers wanted, as much as possible, an accurate count because the count was to be used for the determination of Congressional apportionment."), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981); Wilbourn E. Benton, *1787: Drafting the U.S. Constitution* 958-59 (1986) (statements of Edmund Randolph).

Congress directs is entirely inconsistent with an intention to mandate a specific procedure for determining the respective numbers of the states. *Cf. Wisconsin*, 517 U.S. at 19 ("The text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.' "). Indeed, Congress's discretion, and that of its delegate the Secretary, is bounded only by the requirement that the conduct of the census be consistent with "the constitutional language and the constitutional goal of equal representation." *Id.* at 19-20.

Moreover, the requirement that there be an "actual" enumeration was meant to ensure that the permanent method of apportioning representatives would be based on efforts to ascertain the true size of each state's population, rather than the guesswork to which the Framers initially resorted.[4] *See Young v. Klutznick*, 497 F. Supp. 1318, 1332 (E.D. Mich. 1980) ("When the Constitution speaks of actual enumeration, it speaks of that as opposed to estimates."), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981). The Framers thus surely intended to preclude

4. The Constitution provided for the temporary apportionment of representatives until the first "actual Enumeration" could take place. Article I, section 2, clause 3 provides that

> until such [actual] enumeration shall be made, the State of New Hampshire shall be entitled to chuse three [Representatives], Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

This initial apportionment was based on conjectural judgments about each state's population. Subsequent apportionments were to be based on actual enumerations. *See* Benton, *supra*, at 978 (quoting James Madison: "The last apportionment of Congress, on which the number of Representatives was founded, was conjectural and meant only as a temporary rule till a Census should be established."); *id.* at 366-67 (quoting Nathaniel Gorham of Massachusetts to similar effect).

reliance on unscientific, inaccurate, and unreliable estimations of the population. But just as surely, they did not intend to bar use of scientific, accurate, and reliable statistical techniques that would be developed in the future (techniques with which the Framers would have been entirely unfamiliar).[5] *See City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 678-79 (E.D. Pa. 1980) ("It may be that today an actual headcount cannot hope to be an accurate reflection of either the size or distribution of the Nation's population. If so, it is inconceivable that the Constitution would require the continued use of a headcount in counting the population."); *Young*, 497 F. Supp. at 1332 ("[N]othing in the Constitution . . . prohibits [statistical] adjustment techniques.").[6] In sum, the manifest purpose of the original Census Clause, as expressed in its structure and plain language, supports the

5. The Court has consistently interpreted the Constitution to take account of scientific and technological change. *See, e.g., Katz v. United States*, 389 U.S. 347, 353 (1967) (rejecting rule of *Olmstead v. United States*, 277 U.S. 438 (1928), and holding that wiretapping of telephone conversations by law enforcement officials, conducted without physical intrusion into telephone booth, was protected by Fourth Amendment); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (First Amendment guarantees freedom of expression by means of motion pictures even though technology did not exist in 1791).

6. Of course, the census has never involved an actual headcount of the population as conceived by the appellees. Traditionally, the Census Bureau mails a questionnaire to each household and relies on information provided by the head of each household. In addition, the Bureau has relied on hearsay from neighbors, landlords, mail carriers, and others believed to have reliable information. Approximately seven million persons were enumerated as a result of such "last resort procedures" in the 1990 census. *See* Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 Rev. Litig. 1, 17 (1993). Thus, the federal government has never attempted physically to count the population person by person. *See Young*, 497 F. Supp. at 1329-30 ("It is . . . clear that the decennial census is not, and has not been, for at least the past decade, a simple, straightforward headcount.").

conclusion that the Constitution permits the Secretary to employ statistical sampling techniques to improve the accuracy of the 2000 census for purposes of apportioning seats in the House of Representatives.

2. The "Three Fifths Compromise" in the Original Census Clause Denied Equal Representation to African-Americans and Distorted Equal Representation for Whites.

Once it was decided that the states would be represented in the House on the basis of population, the Framers were faced with the question whether African-American slaves would be included in the census for purposes of apportionment. Although the slaves could not vote, the Southern states demanded representation in the House of Representatives and the Electoral College on the basis of their slave property. Unsurprisingly, Northern delegates opposed this proposal, which promised to increase dramatically the power of the South in the national government. As with the question of the composition of Congress, the Framers reached a compromise: three fifths of each slave would be included in the Southern states' numbers for purposes of representation. U.S. Const. art. I, § 2, cl. 3.[7]

The "three fifths compromise" perverted the very principle of equal representation for which it was ostensibly adopted. By its

7. The "three fifths compromise" is framed as follows:

> Representatives and direct Taxes shall be apportioned among the several states . . . according to their respective numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons.

The compromise also created a significant tax break for slave owners, as southern states would be taxed only on the basis of three fifths of their slave property. *See* James Oakes, *"The Compromising Expedient": Justifying a Proslavery Constitution*, 17 Cardozo L. Rev. 2023, 2039-40 (1996).

terms, the compromise perpetuated the exclusion of African-Americans from the community of equal citizens. But the unholy bargain also polluted equal representation for white people, because white Southerners were rewarded for the practice of slavery with proportionately greater power in Congress than their Northern compatriots without having to enfranchise the slave population.[8] *See* Raymond T. Diamond, *No Call To Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 Vand. L. Rev. 93, 111-13 (1989); James Oakes, *"The Compromising Expedient": Justifying a Proslavery Constitution*, 17 Cardozo L. Rev. 2023, 2039-43 (1996). Thus, until passage of the Reconstruction Amendments, the Census Clause assured that an accurate count of the population, both slave and free, would primarily serve the interests of slave owners.

B. As Altered by the Reconstruction Amendments, the Census Clause Not Only Permits But Affirmatively Encourages Techniques Deemed Necessary to Avoid a Discriminatory Undercount of African-Americans and Other Racial Minorities in the Decennial Census.

The original Constitution in general, and the Census Clause in particular, excluded slaves from membership in the American polity. The Reconstruction Amendments profoundly altered the nature of American citizenship by including African-Americans in the political community. In doing so, the Amendments transformed the Census Clause from a relic of white supremacy into a herald of inclusionary democracy. The Clause, as amended,

8. Of course, women could not vote either, but they were nonetheless considered "citizens" in at least a limited sense. *See Minor v. Happersett*, 88 U.S. 162 (1874) (because the right to vote is not a "privilege [or] immunity" of citizenship, section 1 of the Fourteenth Amendment does not guarantee to female citizens the right to vote). The structure of the Clause reflects the deep paternalism of the Framers. The limited class of white male voters exercised the franchise on behalf of all citizens, including disenfranchised white women. And representation was not based solely on the number of citizens, but on the number of persons, including three fifths the number of slaves.

thus cannot be plausibly construed to ban census techniques that reduce the disproportionate undercount of historically excluded populations and more fully achieve the constitutional goal of equal representation. Indeed, as altered by the Reconstruction Amendments, the Census Clause strongly encourages the adoption of techniques deemed necessary to avoid a discriminatory undercount of the minority population.

1. The Original Census Clause Embodied an Exclusionary Conception of Citizenship.

The idea of citizenship involves the erection of boundaries, the drawing of lines between citizens and others. For most "old world" countries, defining the bounds of the political community was a relatively simple task. Citizens were inhabitants of nations with long-established geographical boundaries and largely shared ethnic, religious, and cultural heritages. *See* Eric Foner, *Who is an American?*, Culturefront, Winter 1995-1996, at 4, 9; Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 1.1(d), at 11 (2d ed. 1992).

For Americans, defining citizenship has been a more complicated matter. Unable to invoke the traditional indicia of community, we have defined ourselves by our common political creed, which emphasizes the universality of equality and freedom. *See The Declaration of Independence* (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, & the pursuit of Happiness."). Americans have thus been united by an ideal of democracy, where freedom is not the privilege of a particular class, but rather the birthright of every human being.

Yet, from the very beginning, the ideal of equal citizenship coexisted with the reality of American slavery. Indeed,

> the most radical claims for freedom and political equality were played out in counterpoint to chattel slavery. . . . The equality of political rights, which is

> the first mark of American citizenship, was proclaimed in the accepted presence of its absolute denial.

Judith Shklar, *American Citizenship: The Quest for Inclusion* 1 (1991).

Proponents of slavery defended exclusion of African-Americans from the community of citizens by insisting that African-Americans lacked the capacity for reason, self-control, independence, and self-governance. *See* Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 Yale L.J. 1563, 1574-76 (1996) (book review); *see also* A. Leon Higginbotham, Jr., *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* 28-52 (1996) (describing development of white supremacist ideology in colonial America). As long as African-Americans were regarded as beings incapable of rationality or civic responsibility, the reality of slavery could coexist, however uncomfortably, with the ideal of universal equality and freedom. Eric Foner, *The Meaning of Freedom in the Age of Emancipation*, 81 J. Am. Hist. 435, 441 (1994) ("The republican vision of a society of independent men actively pursuing the public good could easily be reconciled with slavery for those outside the circle of citizenship.").

Indeed, the existence of chattel slavery helped to define the idea of citizenship — a citizen was someone who was not a slave — giving citizenship "a powerful exclusionary dimension." *Id.* at 438. "Establishing the social, political, and legal structures to support slavery involved creating a clear group of white persons for whom the privileges of citizenship were reserved." Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, 'Foreignness,' and Racial Hierarchy in American Law*, 76 Or. L. Rev. 261, 286 (1997). In this way, the racialized boundaries of the early American community were defined and maintained.

The Constitution adopted by the Framers codified this exclusion of African-Americans from citizenship. The "three fifths compromise" was but the most notorious facet of a Constitution

that embraced and perpetuated slavery.[9] Moreover, the Supreme Court gave its imprimatur to early constitutional racism in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). As Chief Justice Taney wrote:

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?

60 U.S. (19 How.) at 403. The Court's answer was a resounding and painful "no." The decision sealed the fate of all African-Americans, whether slave or free, who were thereafter treated as members of "a subordinate and inferior class of beings" ineligible for inclusion in the national community. *Id.* at 404-05; *see* Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* 44 (1989) (noting that *Dred Scot* "consigned [African-Americans] to a lower caste — a position entirely inconsistent with membership in the 'people of the United States'"). African-Americans remained the "untouchables" of the American community until enactment of the Reconstruction Amendments.

2. The Reconstruction Amendments Introduced an Inclusionary Ideal of American Democracy.

The Thirteenth, Fourteenth, and Fifteenth Amendments fundamentally altered the legal landscape of American democracy. Three years after the ratification of the Fifteenth Amendment, Justice Miller could write for the Supreme Court:

9. Article I, section 9, clause 1 precluded Congress from interfering with the slave trade until 1808 (and did not guarantee that the trade would be halted at that time); Article IV, section 2, clause 3 provided that fugitive slaves who escaped to another state would be returned to their masters; and Article V barred amendment of the prior two provisions before 1808.

> [T]he one pervading purpose found in [the Reconstruction Amendments], lying at the foundation of each . . . [is] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[10]

Slaughter-House Cases, 83 U.S. 36, 71 (1873). Specifically, the Reconstruction Amendments transformed the meaning and operation of the Census Clause, with profound implications for the "constitutional goal of equal representation." *Wisconsin*, 517 U.S. at 20.

The Thirteenth Amendment banned slavery in the United States.[11] In so doing, the Amendment effectively repudiated the

10. Racial segregation, the denial of the franchise, and other forms of unequal treatment did not, of course, perish with the abolition of slavery and the formal admission of African-Americans into the community of American citizens. Reconstruction has proven to be an ongoing process. Contemporary discrimination against and stigmatization of racial minorities continue their exclusion from full participation in the polity. *See* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303, 323 (1986) ("[D]iscrimination against the ethnic outsider is a form of exclusion — not physical exclusion from the country, but exclusion from belonging as a respected and responsible participant in the public life of the community.") (internal quotation omitted). More than a century after emancipation, the dissonance between the American creed of inclusion and the American reality of exclusion remains. *See* Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 23 (2d ed. 1962).

11. The Thirteenth Amendment provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

three fifths compromise, by transforming the "other persons" of the original Census Clause (namely the slaves) into "free persons" entitled to be counted in full for purposes of congressional apportionment. So ended the 40% undercount of African-Americans constitutionalized under the unreconstructed Clause.

Both the proponents and the opponents of the Thirteenth Amendment recognized that the abolition of slavery would mean more than exemption from legal bondage. Freedom would mean entry of African-Americans into political and civil society as the legal equals of whites. *See* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. L. Rev. 1, 8 (1995) ("From the opening gavel, both sides in the legislative debates based their arguments on a common understanding that the Thirteenth Amendment would protect an expansive definition of freedom."). The Thirteenth Amendment therefore not only granted the negative liberty of freedom from chattel slavery, but also granted Congress the power to enact legislation that would ensure positive liberty, freedom to exercise new rights and pursue new opportunities.

The Fourteenth Amendment then sought to ensure that the opportunities opened to African-Americans would be equal to those of white citizens.[12] Section 1 codified the principle of full African-American citizenship, providing:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

12. Although the Fifth Amendment does not include an Equal Protection Clause, this Court has long held that the Fourteenth Amendment's principle of equal protection applies to regulate federal action as well. *See Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1955). In conducting the census, the Secretary of Commerce must therefore strive, as far as is practicable, to fulfill the constitutional goal of equal representation. *See Wisconsin*, 517 U.S. at 19-20.

U.S. Const. amend. XIV, § 1. The Amendment thus overruled the central holding of *Dred Scott* and formally included the freed slaves as equal members of the political community. *See Elk v. Wilkins*, 112 U.S. 94, 101 (1884) ("The main object of the opening sentence of the fourteenth amendment was to settle the question . . . as to the citizenship of free negroes, and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not . . . should be citizens of the United States . . . .") (internal citation omitted); Bernard Schwartz, *The Amendment in Operation: A Historical Overview*, in *The Fourteenth Amendment: Centennial Volume* 29, 30 (Bernard Schwartz, ed., 1970).

Section 2 of the Fourteenth Amendment sealed the demise of the three fifths compromise by providing an explicit new rule for counting the former slaves: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . ." U.S. Const. amend. XIV, § 2. In addition, the second clause of section 2 addressed a structural anomaly that appeared with the abolition of slavery: African-Americans would be counted as whole persons for purposes of apportionment of representatives, but as yet had no guaranteed right to vote for those representatives.[13] To ensure that the end of slavery would not simply increase the power of white Southerners in Congress, without also encouraging full

13. *See Richardson v. Ramirez*, 418 U.S. 24, 73 (1974) (Marshall, J., dissenting); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 46 (1995); William Van Alstyne, *The Fourteenth Amendment, the 'Right' to Vote, and the Understanding of the Thirty-ninth Congress*, 1965 Sup. Ct. Rev. 33, 44 (1965); Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 Cornell L.Q. 108, 109-11 (1960); Joseph B. James, *The Framing of the Fourteenth Amendment* 57-61, 66, 126, 137, 160-61 (1956).

African-American political equality, the Fourteenth Amendment provided:

> But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Id. Congress thus created an incentive for the enfranchisement of African-Americans by tying the prospect of enhanced Southern congressional power to African-American voting rights.[14]

14. *See Richardson*, 418 U.S. at 45-46 (quoting Representative Eliot: "[N]o State should have its basis of national representation enlarged by reason of a portion of citizens within its borders to which the elective franchise is denied. If political power shall be lost because of such denial . . . it is to be hoped that political interests may work in the line of justice, and that the end will be the impartial enfranchisement of all citizens . . . ."); *Reynolds v. Sims*, 377 U.S. 533, 597 (1964) (Harlan, J., dissenting) (quoting Representative Stevens: "The effect of this provision will be either to compel the States to grant universal suffrage or so shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive.").

Section 2 of the Fourteenth Amendment was not the thirty-ninth Congress's only strategy for encouraging voluntary extension of the franchise. For example, one of the necessary conditions under which representatives from the former Confederate states could be readmitted to Congress was their state's adoption of universal manhood suffrage. *See Reconstruction Act of Mar. 2, 1867*, ch. 153, § 5, 14 Stat. 428 (1867). The

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Of course, the most straightforward way to prevent white Southerners from increasing their power at the expense of African-American political equality would have been to extend the franchise to African-Americans. But the thirty-ninth Congress believed that mandatory African-American male suffrage was politically untenable at the time. *See Richardson v. Ramirez*, 418 U.S. 24, 73 (1974) (Marshall, J., dissenting); John M. Mathews, *Legislative and Judicial History of the Fifteenth Amendment* 13, 17 (1971); Joseph B. James, *The Framing of the Fourteenth Amendment* 47, 67-75, 137-39, 185 (1956). African-American men would have to wait for the fortieth Congress to see passage of the Fifteenth Amendment, which directly prohibited disenfranchisement on the basis of race.[15] The Fifteenth Amendment thus finally resolved the suffrage question and removed any remaining doubts as to the enforcement authority of Congress in that area.[16]

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various Acts of Congress readmitting the Southern states to the nation also included this "fundamental condition." *Richardson*, 418 U.S. at 48-52. Of course, the enfranchisement of women was not accomplished until the adoption of the Nineteenth Amendment in 1920.

15. The Fifteenth Amendment provides:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

The Reconstruction Congresses did not consider extending the franchise to African-American women.

16. Unfortunately, the promise of the Fifteenth Amendment was not easily realized. The Southern states adopted ingenious methods to prevent African-Americans from voting, without formally withholding the franchise.

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In sum, the Thirteenth, Fourteenth, and Fifteenth Amendments extended the constitutional goal of equal representation to the African-American population (and ultimately, of course, to other minorities). The Thirteenth and Fourteenth Amendments ended the quintessential disproportionate undercount — the three fifths compromise — and for the first time required a full count of African-Americans in the decennial census. The Fourteenth and Fifteenth Amendments sought to ensure that the newly reconstituted democracy would provide meaningful rights of equal citizenship, by providing first an incentive and then a mandate to extend the vote to African-Americans.

The Census Clause that emerges in the wake of the Reconstruction Amendments refuses to tolerate systematic undercounting of African-Americans and instead mandates a census designed to include, not exclude, racial minorities. The House's suggestion that the Census Clause precludes efforts to eliminate a sustained disproportionate undercount that dilutes the voting power of racial and ethnic minorities thus makes no sense of the language, history, or purpose of the Clause, as amended by the Reconstruction Amendments. To the contrary, the amended Census Clause affirmatively promotes efforts to include historically underrepresented groups, especially African-Americans, as full members of the political community.

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See, e.g., Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (invalidating poll taxes); *Louisiana v. United States*, 380 U.S. 145 (1965) (upholding Congressional legislation banning literacy tests); *United States v. Raines*, 362 U.S. 17 (1960) (repudiating extreme applications of the vagueness and overbreadth doctrines that previously had been applied to defeat federal legislation protective of the right of racial minorities to vote); *Terry v. Adams*, 345 U.S. 461 (1953) (ending the all-white primary); *Lane v. Wilson*, 307 U.S. 268 (1939) (invalidating grandfather clauses). *See generally* C. Vann Woodward, *The Strange Career of Jim Crow* (3d rev. ed. 1974). Thus, the worst fears of the Reconstruction Republicans were realized, as the South increased its representation in Congress while effectively disenfranchising African-American for decades to come. *See* Mathews, *supra*, at 15; Bonfield, *supra*, 46 Cornell L.Q. at 113.

Accordingly, the modern Census Clause not only permits but strongly encourages the freedom to use statistical techniques deemed necessary by the Secretary and his professional advisors to avoid discriminatory undercounting.

C. Section 2 of the Fourteenth Amendment Precludes Congress From Banning the Use of Widely Accepted Corrective Techniques Deemed Necessary by the Secretary to Avoid a Discriminatory Undercount of Racial Minorities.

In *Wisconsin*, this Court considered a challenge to the Secretary's decision not to adjust the census pursuant to the original Census Clause and section 1 of the Fourteenth Amendment. *See* 517 U.S. at 18-19 & n.8. But the *Wisconsin* Court did not consider the potential impact of section 2 of the Fourteenth Amendment. Indeed, the only reference in *Wisconsin* to section 2 of the Fourteenth Amendment occurs in a citation quoting the first clause, *see id.* at 5, and the opinion never considers whether section 2 as a whole alters the meaning of the original Census Clause or imposes independent constraints of its own. In fact, section 2 of the Fourteenth Amendment — by requiring that the "whole number" of racial minorities be counted in each census (instead of only three fifths of each person), and by structurally linking the potentially increased power of Southern states to the enfranchisement of the newly freed African-American citizens — precludes Congress from outlawing corrective statistical techniques deemed necessary by census officials to avoid a differential undercount of racial and ethnic minorities.[17]

17. In *Wisconsin*, the Secretary had declined to adopt corrective techniques, deeming them inappropriate. 517 U.S. at 20-24. In the instant case, however, the Secretary affirmatively wishes to use corrective techniques, deeming them necessary to avoid a discriminatory undercount. Thus, the precise holding of *Wisconsin* is not before this Court. The narrow constitutional issue considered here is whether Section 2 of the Fourteenth Amendment permits Congress to ban a corrective technique deemed necessary by the Secretary to avoid a discriminatory undercount.

Section 2 of the Fourteenth Amendment was intended to serve a single purpose — to offer an effective inducement to the states of the old Confederacy to enfranchise their newly freed minority populations.[18] It is true that, as a practical matter, section 2 of the Fourteenth Amendment has been overtaken by the categorical protection of voting rights afforded to members of racial minorities by the Fifteenth Amendment. But, as this Court demonstrated in *Richardson*, 418 U.S. at 41-56, a close reading of the text and purpose of section 2 of the Fourteenth Amendment remains important in resolving constitutional issues falling within its scope. *Accord Hunter v. Underwood*, 471 U.S. 222, 233 (1985). And it must be remembered that the enfranchisement of African-Americans was central to the purposes of the drafters of Section 2. *See* Bonfield, *supra*, 46 Cornell L.Q. at 109; James, *supra*, at 33 ("Of all the movements influencing the Fourteenth Amendment . . . that for Negro suffrage was the most outstanding.") and at 186 ("Indeed, to those most influential in framing the Fourteenth Amendment, Negro voters seemed the prime objective. Other movements were important principally as they were related to, or might be useful in, attaining this end.").

When section 2 was adopted in 1868, nothing compelled the Southern states to permit African-Americans to vote, even though the emancipation of the slaves would entitle the former Confederate states to elect additional representatives to Congress. Lacking a technique to compel enfranchisement, the thirty-ninth Congress conceived an ingenious enfranchisement device: a mandate that enumeration be based on the "whole number" of the minority

18. Recall that section 2 of the Fourteenth Amendment was drafted at a time when serious doubt existed as to whether the Fifteenth Amendment would ever come into being and when it was unsettled whether either the Equal Protection Clause or the Privileges and Immunities Clause of section 1 would be effective guarantors of the right to vote. *See Pope v. Williams*, 193 U.S. 621 (1904) (privileges and immunities clause of Fourteenth Amendment does not protect the right to vote); *Minor v. Happersett*, 88 U.S. 162 (1874) (same). The Equal Protection Clause was ineffective as protection for voting rights until *Carrington v. Rash*, 380 U.S. 89 (1965).

population coupled with a structural link between the apportionment value of such accurately enumerated minorities and their right to vote. Simply put, lacking coercive leverage, Congress designed section 2 to hold out the carrot of substantially increased Congressional representation to the Southern states in return for enfranchising their minority populations and the stick of reduced representation if they failed to do so.

Avoidance of a differential undercount of the minority population is, therefore, absolutely critical to the structural integrity of section 2, because it was the very size of the minority population that was to serve as the sole inducement for its enfranchisement. If an accurate count of the "whole number" of African-Americans residing in a given Southern state in 1868 would have resulted in one or two additional members of Congress, a significant inducement would have existed under section 2 for state officials to enfranchise minorities and thereby enjoy increased Congressional representation. If, however, African-Americans were differentially undercounted, the additional representation in Congress attributable to them would diminish or evaporate, thereby weakening or destroying the only existing incentive to enfranchise them. The command in section 2 to count the whole number of the population thus mandated the inclusion, not exclusion, of the newly freed African-American population. Allowing Congress to forbid the Secretary from using widely accepted statistical techniques deemed necessary to avoid a discriminatory undercount of the minority population would fly in the face of that mandate.[19]

19. Although Congress's discretion in this area is admittedly broad, that discretion is bounded by the requirement that its conduct of the census be "consistent with the constitutional language and the constitutional goal of equal representation." *Wisconsin*, 517 U.S. at 19-20. A congressional attempt to prevent the Secretary from remedying the differential undercount in the manner he proposes would be inconsistent with the constitutional goal of equal representation as manifested in section 2 of the Fourteenth Amendment. Interpreting the Census Act to require such a prohibition would therefore raise a serious constitutional question.

In this case, census officials are confident that use of statistical sampling techniques to supplement the traditional physical count will prevent an inevitable differential undercount of racial and ethnic minorities, without introducing other unacceptable inaccuracies. As applied to these facts, the Census Act cannot be read to preclude utilization of those techniques, without, at a minimum, raising a serious constitutional question under section 2 of the Fourteenth Amendment.

II.

THE CENSUS ACT MUST BE CONSTRUED CONSISTENTLY WITH CONGRESS'S CONSTITUTIONAL RESPONSIBILITIES AND THEREFORE SHOULD BE INTERPRETED TO PERMIT THE USE OF STATISTICAL SAMPLING FOR APPORTIONMENT PURPOSES.

The Census Act, in which Congress seeks to carry out the constitutional mandate of the Census Clause, is not a model of clarity. The parties agree that sections 141 and 195 of the Act require that sampling be used, where feasible, for all activities except legislative apportionment, but they dispute whether the statute permits the use of statistical sampling in legislative apportionment. The Secretary's reading would permit (but not require) sampling to correct for a disproportionate undercount of minorities that distorts the apportionment process; the House's reading would prohibit sampling for apportionment purposes and thus preclude such a correction.

Amici believe that the appropriate method of resolving this dispute is to interpret the statute in a manner that both makes sense of the 1976 Census Act amendments and best advances the purposes of the post-Reconstruction Census Clause. Such an approach promotes consistency between the mandate of the amended Census Clause and implementing legislation enacted by Congress, which is after all presumed to act in accordance with its constitutional responsibilities. *See Rust v. Sullivan*, 500 U.S. 173,

191 (1991) ("[W]e assume [Congress] legislates in the light of constitutional limitations."); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 466 (1989) ("[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils."); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

The most natural reading of sections 141(a) and (b) and section 195 both reflects the history of the Census Act amendments and is fully consistent with Congress's obligation under the Census Clause, as amended by section 2 of the Fourteenth Amendment, to minimize the undercount of African-Americans. The statutory amendments were enacted after the 1970 census, during which the Bureau of the Census had experimented with certain sampling techniques and had made a statistical adjustment to the census count.[20] *See Young*, 497 F. Supp. at 1328-29. Through the use of these techniques the Bureau of the Census imputed the existence of approximately 4.9 million people, who were added to the census.[21] *Id.* There was an overall recognition that this use of statistical sampling had improved the 1970 census and, in

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20. The sampling techniques employed in the 1970 census included the National Vacancy Check and a post-enumeration Post Office Check. These procedures were described by the Census Bureau in a 1974 publication, "Effect of Special Procedures to Improve Coverage in the 1970 Census." *See Young*, 497 F. Supp. at 1328.

21. This adjustment did not eliminate the census undercount. The Census Bureau has estimated that 10.2 million people were missed in the original household survey; the use of sampling and statistical adjustment techniques reduced the undercount to approximately 5.3 million people. *Id.* at 1329.

particular, had reduced the differential undercount of minorities.[22] Accordingly, the most plausible reading of the Census Act is that Congress amended the Census Act in 1976 to promote greater use of statistical sampling techniques, but left it to the discretion of the Secretary and his professional advisors whether to continue to use the techniques in connection with the reapportionment process.

Prior to 1976, section 141(a) of Title 13 — the provision that empowers the Secretary of Commerce to conduct the census — had been silent concerning the use of statistical sampling.[23] Despite that silence, the Secretary of Commerce had utilized sampling techniques during the 1970 census to generally excellent reviews. The 1976 Congress, responding to the 1970 experience, amended section 141(a) expressly to provide for the use of sampling procedures. As amended, section 141(a) provides, in relevant part:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, *including the use of sampling procedures and special surveys.*

13 U.S.C. § 141(a) (emphasis added).

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22. The House Committee on Post Office and Civil Service described itself as "most impressed with the effectiveness" of the post-enumeration Post Office Check. "Report on Accuracy of the 1970 Census Enumeration," H.R. Rep. No. 91-1777, at 22 (1970).

23. The old provision read:

> The Secretary shall, in the year 1960 and every ten years thereafter, take a census of population, unemployment, and housing (including utilities and equipment) as of the first day of April, which shall be known as the census date.

Pub. L. No. 85-207, 71 Stat. 481, 483 (Aug. 28, 1957) (amended 1976).

In addition, the 1976 Congress enacted a new section 141(b) providing that "[t]he tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives" be completed within nine months of the census. The interrelationship between 141(a) and (b), and the explicit mention of the apportionment process, strongly indicate Congress's awareness that the decennial census for which sampling was permitted under section 141(a) would be used for purposes of apportioning representatives.

The 1976 Congress also amended section 195 of Title 13, which governed the use of statistical sampling for purposes other than apportionment. Whereas the former provision had merely permitted the use of sampling for such purposes,[24] the new section 195 now required the use of sampling, wherever feasible. As amended, section 195 provides:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary *shall*, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195 (emphasis added).

Thus, the 1976 amendments affirmatively promoted the use of statistical sampling by the Census Bureau, both for purposes of apportionment and for other census purposes. The use of sampling for apportionment purposes is within the Secretary's discretion;

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24. The old provision read:

> Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Pub. L. No. 85-207, 71 Stat. 481, 484 (Aug. 28, 1957) (amended 1976).

for all other purposes, the use of statistical sampling is mandatory, where feasible.[25] Prior to the decision below, every federal court to consider the 1976 amendments to the Census Act had concluded that the amended act permits the use of sampling and statistical adjustment for apportionment purposes. *See City of New York v. United States Dept. of Commerce*, 34 F.3d 1114, 1124-25 (2d Cir. 1994), *rev'd on other grounds sub nom. Wisconsin v. City of New York*, 517 U.S. 1 (1996); *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *City of Philadelphia*, 503 F. Supp. at 679; *Young*, 497 F. Supp. at 1334-35.[26]

25. The court below interpreted the Census Act to prohibit sampling for apportionment purposes. The court reached this conclusion by analyzing section 195 in isolation and interpreting it to prohibit sampling for apportionment. The court then turned to section 141 and attempted to divine an interpretation of that provision that would not be inconsistent with its reading of section 195. *See United States House of Representatives v. United States Dept. of Commerce*, 11 F. Supp. 2d 76, 97-104 (D.D.C. 1998). This is an improper mode of statutory interpretation. Both section 141 and section 195 were amended as part of the same act in 1976. Pub. L. No. 94-521, 90 Stat. 2459, 2461, 2464 (Oct. 17, 1976). When Congress makes multiple statutory changes in a single enactment, each change is not to be viewed in isolation; rather, courts are to view the amendments as a unified whole. *See Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) (noting a "cardinal rule" of statutory construction that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.") (internal quotation marks and citation omitted); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (same). Taken together, the amendments to sections 141 and 195 can clearly be seen as an effort by Congress to promote greater use of statistical sampling techniques for both apportionment and other purposes.

26. Several of these courts have suggested that the "except" clause in section 195 would nevertheless preclude the Secretary of Commerce from conducting a census entirely on the basis of statistical sampling, without the base of raw data obtained through the household survey. *See Young*, 497 F. Supp. at 1335 ("All that § 195 does is prohibit the use of figures derived solely by statistical techniques. It does not prohibit the use of statistics in addition to the more traditional measuring tools to arrive at a

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Ignoring the most plausible reading of the Census Act in favor of the Houses's reading, which forbids the use of sampling for apportionment even when necessary to reduce the disproportionate undercount of the minority population, would be wholly inconsistent with the strong encouragement of racial inclusiveness that pervades the post-Reconstruction Census Clause. Even if one were to assume that an exclusionary reading of the Census Act mandating a racially discriminatory census were as plausible as an inclusionary reading (and it is not), this Court should choose the reading that advances the inclusionary purpose of the post-Reconstruction Census Clause.

In fact, an exclusionary interpretation of the Census Act would raise substantial constitutional questions under section 2 of the Fourteenth Amendment. As discussed above in Point I(C), the efficacy of section 2 turns on an accurate count of the minority population. Accordingly, section 2 may well forbid Congress from preventing the Secretary from taking widely accepted steps to avoid a discriminatory undercount of the minority population

This Court regularly construes ambiguous statutory provisions so as to avoid substantial constitutional questions. *See, e.g., Public Citizen*, 491 U.S. at 465-66; *Edward J. DeBartolo Corp.*, 485 U.S. at 575; *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909). In this case, our reading is not only the most plausible, but it advances the purpose of the post-Reconstruction Census Clause and avoids a serious

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more accurate population count."); *Carey v. Klutznick*, 508 F. Supp. at 415 ("[I]n the area of apportionment where important constitutional rights are at stake, the Census Bureau may utilize sampling procedures but only in addition to more traditional methods of enumeration."). The difference between these two readings of the Census Act is immaterial to the matter before the Court, for the Secretary of Commerce has indicated an intention to use statistical sampling only to supplement, not to supplant, the traditional household survey.

constitutional question under section 2 of the Fourteenth Amendment. Accordingly, this Court should construe the Census Act to permit the Secretary of Commerce to incorporate statistical sampling techniques into the 2000 census in order to minimize both the overall undercount and the differential regional and minority undercounts inherent in the traditional census.[27]

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the decision below and to uphold the authority of the Secretary of Commerce to use statistical sampling in the 2000 census for purposes apportionment in order to correct for the historic undercount of African-Americans and other minority citizens.

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27. The court below suggested that the interpretation of the Census Act advanced in this brief would also raise a constitutional question, because the use of sampling might be inconsistent with the requirement in Art. I, sec. 2, cl. 3 for an "actual enumeration." *See House of Representatives*, 11 F. Supp. 2d at 98-99. As discussed in Part I(A)(1), *supra*, and as other briefs in support of appellants will no doubt explain at length, the phrase "actual enumeration" in Article I was never meant to require simply a counting of heads, but instead required Congress to conduct as accurate a count as possible to replace the population estimates used in the original apportionment of the House of Representatives. Thus, the "actual enumeration" claim asserted by appellees does not raise a substantial constitutional question, and the traditional rule of construction favors a reading of the Census Act that permits sampling.

The court below was, therefore, in error when it invoked the doctrine of "constitutional doubt" in support of its interpretation of the Census Act as forbidding statistical sampling. This Court has made clear that this rule of construction need not be applied unless the constitutional question that would be raised by a contrary construction of a statute would "lead a majority gravely to doubt that the statute is constitutional." *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1228 (1998).

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